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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 816

LAWRENCE RASSANO, PETITIONER

v.

ROBERT F. KENNEDY,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a) is not yet reported. The memorandum opinion of the district court appears in Pet. App. 1a-7a.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1961 (Pet. App. 8a). The petition

for a writ of certiorari was filed on March 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action under Section 360(a) of the Immigration and Nationality Act of 1952 by a person against whom deportation proceedings are pending, to have a claim of citizenship determined prior to the termination of the deportation proceedings, was properly held abated by reason of the enactment of the Act of September 26, 1961, providing a different form of judicial review of issues of citizenship determined in deportation proceedings.

STATUTES INVOLVED

The applicable statutes provide in pertinent part as follows:

1. Section 5 of the Act of September 26, 1961, 75 Stat. 651 (8 U.S.C. (Supp. III) 1105 (a)):

> (a) The procedure prescribed by, and all provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 *et seq.*) shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior Act, except that—
>
> * * * *

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

* * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. * * *

* * * * *

2. Section 5(b) of the Act of 1961, *supra*:

This section shall take effect on the thirtieth day after its approval and, notwithstanding the provisions of any other law, including section 405 of the Immigration and Nationality Act, shall then be applicable to all administrative pro-

ceedings involving deportation or exclusion of aliens notwithstanding (1) that the person involved entered the United States prior to the effective date of this section or of the Immigration and Nationality Act or (2) that the administrative proceeding was commenced or conducted prior to the effective date of this section or of the Immigration and Nationality Act. Any judicial proceeding to review an order of deportation which is pending unheard in any district court of the United States on the effective date of this section (other than a habeas corpus or criminal proceeding in which the validity of the deportation order has been challenged) shall be transferred for determination in accordance with this section to the court of appeals having jurisdiction to entertain a petition for review under this section. Any judicial proceeding to review an order of exclusion which is pending unheard on the effective date of this section shall be expedited in the same manner as is required in habeas corpus. All laws or parts of laws inconsistent with this section are, to the extent of such inconsistency, repealed. If any particular provision of this section, or the application thereof to any person or circumstance, is held invalid, the remainder of this section and the application of such provision to other persons or circumstances shall not be affected thereby.

3. Section 360(a) of the Nationality Act of 1952 (8 U.S.C. 1503(a)):

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or

official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

STATEMENT

On January 26, 1961, petitioner was served by the Immigration and Naturalization Service with an order to show cause why he should not be deported. Pursuant to a warrant issued under the immigration laws, petitioner was taken into custody by immigration authorities, as an alien. He was released on $5,000 bond (Pet. 12-13).

In an amended complaint filed in the United States District Court for the Northern District of Illinois under Section 360(a) of the Nationality Act of 1952, *supra*, pp. 4-5, he sought a declaratory judgment that he was a United States citizen by virtue of the na-

turalization of his father while petitioner was a minor. The right to bring the action under Section 360(a) was predicated on the allegation that the commencement of deportation proceedings and the arrest under the immigration warrant applicable only to an alien were a denial of a right or privilege of a citizen of the United States on the ground that he was not a citizen (Pet. 10-11). The government moved to dismiss the complaint for failure to show that a final administrative order had been issued, as required by Section 360(a). The district court granted the motion, pointing out that no final order as to deportation had as yet been issued, and that the validity of the warrant of arrest, which was merely preliminary to the deportation hearing, was dependent on the outcome of the deportation hearing (Pet. App. 1a-7a). The court of appeals dismissed without prejudice the appeal from the order of the district court, holding that petitioner's action, under Section 360(a), had abated in October 1961, when Section 5(a) of the Act of 1961 (enacted in the interim) became effective, since that section provided that an action under Section 360(a) would no longer lie to review issues of nationality determined in deportation proceedings.

On September 15, 1961, the Immigration and Naturalization Service had found petitioner deportable (Pet. 14). On appeal, the Board of Immigration Appeals, on March 12, 1962, remanded the case to the special inquiry officer of the Service because it felt that the evidence was insufficient to show that petitioner had not acquired derivative citizenship. The

case is now pending before the Service for a new hearing (Pet. 15).

ARGUMENT

Section 5(a)(5) of the Act of September 26, 1961 clearly and unequivocally provides that, where a question of American nationality is involved in a deportation proceeding, "such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise." *Supra*, p. 3. Section 5(b) of the 1961 Act makes that law applicable to all administrative proceedings, even if commenced or conducted prior to the effective date of the 1961 law. *Supra*, pp. 3-4. The issue of petitioner's nationality is necessarily involved in the deportation proceedings which have not yet been concluded. If a final order of deportation should be issued—and at this juncture it cannot be known whether or not an order will issue—petitioner will have the full right of judicial review provided in the 1961 Act. He has no such right now since Section 5 provides for judicial review only of final orders of deportation. The court of appeals therefore properly held that, in view of the provisions of Section 5 of the 1961 Act, petitioner's action under Section 360(a) of the Nationality Act of 1952 had abated.

Petitioner argues that, since he predicated his action under Section 360(a) on the claimed denial of a right of citizenship involved in the mere fact of arrest as an alien—without regard to the deportation proceeding—his right of action should not be deemed to have been affected by the 1961 Act which, as noted,

applies only to final orders of deportation. However, the 1961 Act, in specifically making its provisions applicable to all administrative proceedings then pending, indicates the intention to have all issues of nationality involved in deportation proceedings determined in the manner provided by the new Act. The whole purpose of the Act would be defeated if the issue of nationality could be litigated prior to the termination of deportation proceedings by the simple device of alleging that incidental aspects of the proceeding were themselves the subject of separate judical review.[1]

Moreover, even without regard to the provisions of the 1961 Act, petitioner's appeal was properly dismissed since his cause of action was premature. The mere fact of arrest as an alien for the purpose of holding a hearing which will ultimately determine, *inter alia*, whether petitioner is an alien is not the kind of denial of a right as a citizen which will support an action for judicial review prior to the termination of the administrative proceeding. This Court so decided long ago in *United States* v. *Sing Tuck*, 194 U.S. 161, where a group of Chinese, held by immigration authorities when they attempted to enter the country, sought to have their claim of citizenship decided by a court in habeas corpus proceedings before exercising their right of appeal to the Secretary of Commerce and Labor. In overruling their right to test the issue at such time, this Court said that it was "one of the necessities of the admin-

[1] It is clear that the arrest here was part and parcel of the deportation proceeding.

istration of justice that even fundamental questions should be determined in an orderly way". Recognizing that, if the allegations of the petition were true, "the petitioner theoretically is entitled to his liberty at once", the Court held that nevertheless "a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right". (194 U.S. at p. 168). See also *Florentine* v. *Landon*, 206 F. 2d 870 (C.A. 9), certiorari denied, 347 U.S. 927.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

April 1962.

U. S. GOVERNMENT PRINTING OFFICE, 1962 636177 1225